No. 11889

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. T. POTTER, et al.,
Appellants,

v.

KAISER COMPANY, INC., a corporation, and UNITED STATES OF AMERICA,
Appellees.

Upon Appeal from the United States District Court for the District of Oregon.

APPELLANTS' REPLY BRIEF

GREEN, LANDYE & PETERSON,
JAMES T. LANDYE,
Attorneys for Appellants.

GORDON JOHNSON,
RICHARD DEVERS,
THELEN, MARIN, JOHNSON & BRIDGES,
HART, SPENCER, MCCULLOCH & ROCKWOOD,
Attorneys for Kaiser Company, Inc.

TOM C. CLARK, Attorney General
PEYTON FORD, Assistant Attorney General
HENRY L. HESS, United States Attorney
Attorneys for United States of America.

DEMPSEY, KIMBEY & DOWNS, PRINTERS

TABLE OF CONTENTS

INDEX OF CASE CITATIONS

OTHER AUTHORITIES

No. 11889

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. T. POTTER, et al.,
Appellants,
v.
KAISER COMPANY, INC., a corporation, and UNITED STATES OF AMERICA,
Appellees.

Upon Appeal from the United States District Court for the District of Oregon.

APPELLANTS' REPLY BRIEF

In reply to respondent's brief, appellants will limit argument to the principal points made by respondent.

1. *Respondent's Argument that Appellants Failed to Distinguish between Existing and Future Claims in Contending that Act Not Intended to Apply Where Employees* REQUIRED *to Report at Specified Time in Advance of Regular Shifts.*

Respondent first charges that appellants have failed to distinguish between the application of the Portal-to-Portal Act to then existing claims and to future claims. (Resp. Br. p. 10) Appellants' brief, at pages 24 to 26,

discusses and recognizes this distinction and goes on to demonstrate why, in spite of this distinction, it cannot be said that Congress intended that the Portal-to-Portal Act should apply to either existing or future claims where employees were *required* to report at a specified time in advance of their regular shifts.

It may be that the colloquy in the Senate between Senator Pepper and Senator Baldwin may not be conclusive on this point for the reasons stated by respondent. But that does not answer the other arguments in appellants' brief in support of this contention. For example, no attempt is made by respondent to qualify or explain away the statement made in the House of Representatives by Representative Walter in presenting the Act on the floor of the House and in discussing the meaning of the term "custom and practice" in Section 3 of the Act (Section 2 of the final Act, dealing with existing claims). As quoted in Appellant's Brief, p. 19, Representative Walter stated that no employer could *require* an employee to get to work an hour before punching the clock and then excuse himself on the ground of custom and practice. Yet that, in effect, is what respondent would do in this case and that is what Representative Walter says that Congress did not intend, even as to then existing claims.

2. *Respondent's Argument that Portal-to-Portal Act not Limited to Portal-to-Portal Cases.*

Respondent next argues that the Portal-to-Portal Act is not limited to Portal-to-Portal cases. (Resp. Br. p. 12). Thus respondent cites three cases in which it has been held that this Act is not limited to such cases, despite the title of the Act. (Id., pp. 12-14). It is true that some courts have so held, but respondent has not cited any Circuit Court of Appeals decision to that effect. On the contrary, as cited in Appellant's Brief (p. 20), it has been held in *Western Union v. McComb* (CC..A. 6th), 165 F. (2d) 65, that the "underlying reason" for the Act was to foreclose myriads of suits for compensation for "'walking time and the like" brought under the decision in the *Mt. Clemens* case. Nor does respondent attempt to explain other authority to the same effect in appellants' brief (pp. 17-21). It is, of course, self-evident that there was at all times a clear distinction between such "portal-to-portal" cases, in which employees were not *required* to be on the premises at any specified time and place and cases in which employees had been so required to report and as to which there had been no question of liability for payment, at least since 1940, when the U. S. Department of Labor made a public statement of that position. (See App. Br. p. 21).

Two lower court decisions are cited by respondent in an attempt to answer this argument and to establish re-

spondent's contention that the Act applies to bar existing claims even when employees were *required* to report for work at a specified time and place in advance of their regular shift. (Resp. Br. pp. 15-19). In reading the first of these cases, *Battery Workers Union v. Electric Storage Battery Co.,* 14 Labor Cases, Para. 64, 298, it clearly appears that there was no *requirement* that the employees report for work early, but only that it was the "general practice" that some employees arrive "about" 15 minutes early and that other employees "customarily" arrived "20 to 30 minutes" before the beginning of the shift. Similarly, in the other case of *McLaughlin et al. v. Todd & Brown, Inc.*, 15 Labor Cases, Para. 64-606, it was expressly stated that" * * *There seems to have been *no requirement* that the firemen appear at any specified time before the beginning of their regular work activities", but that they "felt it was a requirement that they should appear *sometime* before 8:00 A. M." It thus follows that neither of these cases are much different from the usual "portal-to-portal" case in which there was no *requirement* that employees report at any specified time and place in advance of regular shifts and that the cases are not authority for application of the Act to situations where, as in this case, such a requirement had been imposed, and by written instructions from the employer.

3. *Respondent's Argument that Activities Involved were Preliminary in Nature.*

Respondent argues, in effect, that the finding of the Court that the activities involved in this case were "preliminary" to their "principal" activities must be sustained and that, in any event, there was no contract to compensate them for such activities. (Resp. Br. pp. 19-22). Appellants are content to stand on the argument of their opening brief, which demonstrates that, as a matter of law, the activities here involved were not "preliminary" in nature, but must be regarded as among the "principal" activities of these employees. (App. Br. pp. 22-32). As stated therein, the official position of the Government is that all preparatory activities which are an integral part of a principal activity *have always been regarded as work and as compensable under the Fair Labor Standards Act, (and) remain so under the Portal Act, regardless of contrary custom or contract.*" (App. Br. p. 29). Thus it follows that the distinction in the Act between future and existing claims was not intended to have any bearing as to such activities, particularly where, as here, the employee was *required* to report at a specified time and place.

4. *Respondent's Argument that Employment at Hourly Rates is Immaterial.*

Respondent next argues that the employment of appellants at hourly rates does not make the activities sued

on compensable and would distinguish two of the cases cited in Appellants' Brief on the ground that they involved written contracts for employment at hourly rates, while in this case there was no written contract. (Resp. Br. pp. 22-24).

It has now been held by this Court that under a written contract an employee is entitled to back wages under the Fair Labor Standards Act for work during lunch periods even though in the past no employee was paid any wages at all for such work outside their regular shifts. *Joshua Hendy Corp. v. Mills,* (C.C.A. 9th), decided September 15, 1948. Although it is recognized that there are certain distinctions to be made from the facts of this case, it is submitted that there is a basic and controlling similarity in comparing such a situation involving a *written* contract for employment at hourly rates, with time and one-half for overtime, *but with a practice of not paying for certain work* and a situation involving an *oral* contract for employment at hourly rates, with time and one-half for overtime, but with a similar practice of not paying for certain work, which are the facts of this case.

In both cases the eployees were paid at hourly rates and for all *other* overtime. In neither case were the employees paid any wages whatever for the time spent in the activities in question. Thus the same inference

follows in both cases, i. e., that once it has been determined that the time spent in the activities in question constituted "time worked" within the meaning of the Fair Labor Standords Act, (which is to be considered as a part of the employment contract), the employees are thus entitled to overtime compensation under the terms of such contract and the Portal-to-Portal Act has no application.

On the other hand, respondent makes no attempt to distinguish the remaining case cited in Appellants opening brief (p. 34), that of *Marchant v. Sands Taylor & Wood Co.*, 75 F. Supp. 783, 787, in which an employee employed on a *weekly salary, without a written contract,* was held to be entitled to overtime pay for time spent after the regular closing time and on Saturdays, despite the fact that no such payment had been made previously. It is true that the Court in that case awarded additional half time instead of time and one-half, on the ground that the weekly salary already compensated for straight time. Similarly, it could be contended in this case, if the Court should refuse to allow time and one-half pay for the time in question, it should at least allow additional half-time pay on the basis of the *Marchant* case.

5. *Respondent's Argument that Portal-to-Portal Act Bars Claims Based on Contracts Implied in Fact.*

Respondent argues that the language of Section 2 of the Portal-to-Portal Act in referring to "an express provision of a written or non-written contract' forecloses any recovery based on a contract implied in fact (Resp. Br. p. 24). Respondent also cites three cases to support this contention (Resp. Br. p. 25), but none of them involved facts in which the employees were *required* by their employer to report at a specified time and place in advance of their regular shifts, as in this case.

On the other hand, the case of *Conwell v. Central Mo. Tel. Co.* (W. D. Mo. W. D.), 74 F. Supp. 542, cited in Appellants' opening brief (pp. 36-38), is directly to the contrary and in support of appellants' position in this case. Moreover, the recent decision of the Circuit Court of Appeals for the Second Circuit in *Battaglia v. General Motors Corp.*, (July 8, 1948), 15 Labor Cases, Par. 64, 619, seems to support the same position by the following reference to the Portal-to-Portal Act:

> " * * * it left express private contracts *and those implied in fact,* except to the extent that they may be said to have had reference to prior statutory law, untouched and enforceable in the courts as before under applicable legal principles."

See also *Ercole v. Pictorial Research* (N. Y. Sup. Ct., July 16, 1948) 8 W. H. Cas. 138, in which it was held that the Portal-to-Portal Act does not even apply to claims for compensation for travel time when driving the employer's equipment and crew, despite the absence of an express contract, as respondent would define the meaning of that term.

It is thus significant to call attention to the fact that the Courts have not defined this term with the rigidity which respondent would apparently require. Thus in *Timm v. Brown* (Calif.) 178 P. (2d) 10, at p. 15 it is held that

> "By 'express agreement', in this connection, is meant, not merely a promise, in exact words, to pay a given sum as rental. Any language necessarily imparting an undertaking on the part of the lessee to pay the rent will satisfy the requirements of the rule, for the distinction to which we have referred rests on the nature of the lessee's obligation."

Again in *Voorheis et al. v. Burell,* 20 Ill. App. 538, at 542, it is held that

> "The contract of employment is no less express because the 'price or 'amount' that the party may receive is not agreed upon in advance, but is to depend upon the uncertain result of some business venture or upon some other contingency, which will in the future determine the compensation to be received."

It is therefore submitted that where, as here, an employee is required by written directions of his employer to report for work at a specified time and place in advance of regular shift changes and to undertake certain duties at that time and place, the requirements of "express contract", as set forth in the *Timm* and *Voorheis* cases are fully satisfied. Moreover, even if it be held that such is not the case, and without withdrawing this contention, it is next submitted that the *Conwell, Battaglia* and *Ercole* cases demonstrate again that the Portal-to-Portal Act was never intended to apply to such a case.

6. *Respondent's Argument that Recovery in this Case would be a Windfall and would be for Time Outside the Compensable Portion of the Day.*

As to respondent's argument that recovery in this case would be a "windfall" (Resp. Br. 25), it is sufficient to point out that while there may be such an element in recovery for a claim for walking time or for other "portal-to-portal" time not specifically required by the employer, the situation is far different when, as here, the employer has *required* the employee to report at a specified time and place. Surely payment for such time cannot be considered to be a "windfall' within the meaning of the Act. Nor would such recovery be any more of a "windfall" nature than that allowed in the *Conwell* and *Ercole* cases, supra, or by this Court in the

Hendy case, supra, for in none of these cases had any payment for the time in question been previously made nor, apparently demanded by the employees.

Similarly, respondent's argument that the time involved in this case was not during the compensable portion of the day, within the meaning of Section 2(b) of the Act, is no more in point in this case than in the *Ercole* or *Hendy* cases, supra, where no payment had previously been made for the time involved in those cases, nor did the contracts of employment expressly make such time compensable any more than in this case. It thus must follow that Section 2(b) was not intended to apply to time spent after an employee was *required* by his employer to report at a specified time and place.

7. *Respondent's Argument that Act Constitutional.*

Respondent makes no argument in support of the constitutionality of the Portal-to-Portal Act other than to make reference to the brief filed by the United States as intervenor and the citation of two recent decisions which would uphold the constitutionality of the Act, as a general proposition. From this respondent concludes, in haste, that the Act is constitutional "as applied to the present case." (Resp. Br. p. 27)

But it should be carefully noted that neither of the two cases cited by respondent involved facts similar to

those involved in this case. The case of *Battaglia v. General Motors Corp.* (CCA 2d) 15 Labor Cases, Par. 64, 619, involved claims for walking time, changing clothes, etc. The case of *Fisch v. General Motors Corp.* (CCA 6th) 15 Labor Cases, Par. 64, 674, also involved "walking time and other activities preliminary to actual work, . . . "Thus neither case can be regarded as authority for the proposition that the Act is constitutional as applied to a case in which employees were *required* by their employer to report at a specified time and place in advance of shift changes.

Likewise, the brief filed by the United States as intervenor deals wholly with the question of whether the Act is constitutional as a general proposition and is quite evidently a form brief used by the government in other cases under the Act in which the constitutional question had been raised. It wholly fails to discuss or answer the contentions in appellants' brief that even though the Act may be constitutional as a general proposition when applied to the ordinary "portal-to-portal " case involving walking time and other activities *prior to the required time for reporting for work*, the Act is unconstitutional if applied to bar claims for compensation in cases in which employees were *required* by written instructions of their employer to report at a specified time and place in advance of shift changes and were never paid for the intervening time or for their *required*

duties performed therein. Also, on the general question of constitutionality, see Barnett, *The Portal-to-Portal Act of* 1947 : *Direct and Indirect Impairment of Vested Rights,* 27 Or. L. Rev. 274 (June 1948).

CONCLUSION

For the foregoing reasons it is submitted that respondent has failed to answer the contentions set forth in appellants' opening brief and that for the reasons set forth therein it should be held either that the Portal-to-Portal Act has no application to the facts of this case or, if so applied, is unconstitutional and that the judgment of the lower Court should therefore be reversed.

Respectfully submitted,

B. A. Green
James Landye
Green, Landye & Peterson
Attorneys for Appellants.